

1 Michael Winsor
2 Special Assistant Attorney General
3 Montana State Auditor's Office
4 840 Helena Avenue
5 Helena, MT 59601
6 (406) 444-2040

7 Attorney for the Securities Department

8 **BEFORE THE STATE AUDITOR AND COMMISSIONER OF SECURITIES**
9 **HELENA, MONTANA**

10 In the matter of:)

11 WACHOVIA SECURITIES, LLC;)
12 and)

13 WACHOVIA CAPITAL MARKETS,)
14 LLC,)

15 Serve Wachovia Securities, LLC at:)

16 One North Jefferson Avenue)
17 St. Louis, Missouri 63103)

18 Serve Wachovia Capital Markets, LLC)
19 at:)

20 301 S. College Street)
21 TW-8, Mail Code NC0602)
22 Charlotte, North Carolina 28288-0601)

23 Respondents.)
24)
25)
26)

CAUSE NO. SEC-2009-5

CONSENT AGREEMENT AND FINAL ORDER

Consent Agreement dated this 19 day of FEBRUARY, 2009, between the

Montana Securities Department ("Department"), acting pursuant to the authority of the Securities Act of
Montana, Mont. Code Ann. § 30-10-101, *et seq.* and Mont. Code Ann. § 2-4-603, and Respondents.

WHEREAS, Wachovia Securities, LLC¹ ("Wachovia Securities"), is a broker-dealer registered in
the state of Montana with its home office at One North Jefferson Avenue, St. Louis, Missouri, and
Wachovia Capital Markets, LLC ("Wachovia Capital Markets", collectively with Wachovia Securities,

¹ In October 2007, Wachovia Corporation acquired the Missouri-based broker dealer A. G. Edwards & Sons, Inc.
("AG Edwards") which was subsequently combined with Wachovia Securities, LLC.
Consent Agreement and Final Order, Wachovia

1 "Wachovia"²), is a broker-dealer with its home office at 301 South College Street, Charlotte, North
2 Carolina; and

3 WHEREAS, a multi-state task force conducted and coordinated investigations into Wachovia's
4 marketing and sale of auction rate securities to investors during the period of January 1, 2006, through
5 February 14, 2008; and

6 WHEREAS, after a books and records inspection by a multi-state task force on July 17, 2008,
7 Wachovia Securities has cooperated fully with regulators conducting the investigations by responding to
8 inquiries, providing documentary evidence and other materials, and providing regulators with access to
9 information relating to the investigations; and

10 WHEREAS, Wachovia has advised regulators of its agreement to resolve the investigations
11 relating to its marketing and sale of auction rate securities to investors; and

12 WHEREAS, Wachovia agrees to, among other things, reimburse certain purchasers of auction
13 rate securities, and to make certain payments at the direction of the Department; and

14 WHEREAS, Wachovia elects to permanently waive any right to a hearing and appeal under Mont
15 Code Ann. § 30-10-308, with respect to this Consent Agreement and Final Order (the "Order");

16 NOW, THEREFORE, the State Auditor and Commissioner Securities, as administrator of the
17 Securities Act of Montana, Mont. Code Ann. § 30-10-101, *et seq.* hereby enters this Order.

18 I.

19 **FINDINGS OF FACT**

20 1. Wachovia Securities admits the jurisdiction of the Department and Wachovia Capital
21 Markets consents to the jurisdiction of the Department for purposes of this Order. Neither admits nor
22 denies the Findings of Fact and Conclusions of Law contained in this Order, and each consents to the
23 entry of this Order by the State Auditor and Securities Commissioner.

24 2. Auction rate securities are long-term debt or equity instruments that include auction

25 ² Factual allegations in this Order may apply to Wachovia Securities and/or Wachovia Capital Markets, but do not
26 necessarily refer to both entities.

1 preferred shares of closed-end funds, municipal auction rate bonds, and various asset-backed auction rate
2 bonds (collectively referred to herein as "ARS"). While ARS are all long-term instruments, one
3 significant feature of ARS (which historically provided the potential for short-term liquidity) is the
4 interest/dividend reset through auctions that occur in varying increments of between 7 and 42 days. If an
5 auction is successful, investors are able to exit the ARS market on a short-term basis. If, however, an
6 auction "fails," investors are required to hold all or some of their ARS until the next successful auction in
7 order to liquidate their funds. Beginning in February 2008, the ARS market experienced widespread
8 failed auctions.

9 3. In early March 2008, Wachovia Securities' investors, unable to access their ARS funds,
10 began to submit complaints to the Department. Since early March, 2008, the Department has received
11 several investor complaints concerning the sale of ARS by Wachovia Securities. It appears that Montana
12 investors have invested at least \$14,033,000 in ARS through Wachovia.

13 **Marketing and Sales of ARS to Investors**

14 4. In connection with the sale of ARS, some Montana investors state variously that they
15 were told by Wachovia Securities and its registered agents that ARS were:

- 16 a. just like cash;
- 17 b. same as cash;
- 18 c. safe as cash;
- 19 d. same as money markets;
- 20 e. safe as money markets;
- 21 f. cash equivalents;
- 22 g. short-term adjustable rate securities;
- 23 h. cash alternatives;
- 24 i. completely safe;
- 25 j. liquid at any time; and/or

k. always liquid at an auction.

Although marketed and sold to investors as safe, liquid, cash-like investments, and although the ARS market had, in fact, functioned for more than twenty years with virtually no auction failures, ARS are actually long-term instruments subject to a complex auction process that, upon failure, can lead to illiquidity and lower interest rates.

5. Wachovia Securities further fostered the misconception that ARS were cash-like instruments by providing account portfolio summaries to certain of its customers that listed ARS as "cash equivalents." In fact, ARS were not "cash equivalents" and full liquidity was only available at an auction if the auction was successful.

6. Although Wachovia Securities sold ARS as conservative, safe, and liquid investments to its investors until February 2008, Wachovia had information that several auctions had failed in August 2007 and early 2008, before the mass failures in February 2008. During this same period of time, Wachovia failed to inform its customers purchasing ARS after such auctions began to fail that certain auctions would have failed had Wachovia or another broker-dealer not entered support bids in those auctions.

7. Although Wachovia knew, or should have known, of the inherent risks and the recent volatility of the ARS market, only minimal information regarding the ARS market was provided to Wachovia Securities' retail ARS customers.

8. Wachovia and its registered securities agents were, or should have been, aware that the ARS market was suffering from increasing failures and liquidity issues, and they should have disclosed those facts to investors who were purchasing auction rates after such issues arose. Based on these facts, Wachovia engaged in dishonest and unethical practices in the marketing and sale of ARS. Pursuant to Mont. Code Ann. §§ 30-10-207, 30-10-201(13)(g), these practices constitute grounds to revoke Wachovia's registration. These practices included, among other things, the following:

a. Wachovia told some ARS investors purchasing ARS after the market disruptions

1 began to occur that:

- 2 i. ARS were cash equivalents;
- 3 ii. ARS were completely safe; and/or
- 4 iii. ARS were liquid at any time.

5 b. Wachovia was or should have been aware that the market for ARS was becoming
6 illiquid, yet Wachovia Securities continued to market and sell ARS to investors.

7 **Temporary Maximum Rate Waiver on Certain ARS**

8 9. The interest rates on ARS are reset periodically through the auction process. In the event
9 that there is insufficient demand for a particular issue and an auction fails, the interest rate resets to a
10 "maximum rate" or "failure rate" as defined in the offering documents for that particular issue. Typically,
11 this maximum rate would be higher than prevailing market rates in order to compensate ARS holders who
12 are unable to sell their positions and offer an "incentive" to induce buyers to return to the market although
13 in some cases, particularly for student loan auction rates, the maximum rate might be lower than the
14 prevailing rate.

15 10. In December 2007, with the encouragement of its underwriters, the Missouri Higher
16 Education Loan Authority ("MOHELA") sought and secured approval to waive its maximum rate for
17 certain issues of ARS. Absent such waivers, the ARS issued by MOHELA would not have been allowed
18 to reset at interest rates high enough to clear auctions.

19 11. As a result of the maximum rate waivers, certain MOHELA ARS issues reset to a higher
20 rate for a brief period after the waiver was implemented. However, due to a feature of those issues that
21 caps the average interest rate over any given one-year period, the interest rates reset to 0% after the
22 expiration of the waiver period. The ramifications of this maximum rate waiver were not explained to
23 Wachovia Securities' customers who subsequently purchased MOHELA ARS.

24 12. Wachovia Securities engaged in dishonest and unethical practices by not adequately
25 explaining to individual investors who purchased ARS with maximum rate waivers, among other things,

1 the following:

2 a. that the ARS interest rates could not be reset at a level that would prevent a failed
3 auction absent the maximum rate waiver; and

4 b. that the high interest rate allowed by the waiver would expire at the end of the
5 waiver period unless extended by the issuer.

6 Pursuant to Mont. Code Ann. §§ 30-10-207 and 30-10-201(13)(g), these practices constitute grounds to
7 revoke Wachovia Securities' registration.

8 **Failure To Supervise Agents Who Sold ARS**

9 13. Although ARS are complicated and complex products, Wachovia Securities did not
10 provide its sales or marketing staff with the training and information necessary to adequately explain
11 these products or the mechanics of the auction process to their customers. During the course of
12 investigations, on-the-record statements taken from Wachovia Securities' registered agents demonstrated
13 that these agents lacked a basic understanding of the functionality of the ARS products and the auction
14 rate market.

15 14. Many of Wachovia Securities' registered agents were not adequately educated in the
16 ARS products they were selling and did not know where to look for information to bolster that
17 knowledge. Wachovia Securities failed to provide timely and comprehensive sales and marketing
18 literature regarding ARS and the mechanics of the auction process. In addition, Wachovia Securities
19 failed to review account portfolio statements sent to its customers to ensure that they reflected accurate
20 information regarding ARS.

21 15. Wachovia Securities' failure to provide sufficient training and information concerning
22 ARS and the market environment in which they were sold was not limited to one or two agents, and is
23 therefore indicative of Wachovia Securities' failure to ensure that its registered personnel provided
24 adequate information regarding ARS to its customers.

25 16. Wachovia Securities failed to reasonably supervise its employees, which is grounds for

1 revocation of its registration under Mont. Code Ann. 30-10-201(13)(k).

2 a. failing to provide adequate training to its registered agents regarding ARS

3 by, among other things:

4 i. failing to provide timely and comprehensive sales and marketing

5 literature regarding ARS and the mechanics of the auction process;

6 ii. failing to provide pertinent information concerning the complexity of the

7 ARS product; and

8 iii. failing to ensure that its agents were selling ARS to individual investors

9 for whom they were suitable; and

10 b. failing to review account portfolio statements sent to its customers to ensure

11 that they reflected accurate information regarding ARS;

12 c. failing to review ARS transactions in accounts of customers who needed

13 liquidity; and

14 d. failing to ensure that its registered personnel were providing adequate

15 information regarding ARS to its customers.

16 **II.**

17 **CONCLUSIONS OF LAW**

18 17. The State Auditor is the Commissioner of Securities (Commissioner) pursuant to Mont.
19 Code Ann. § 30-10-107.

20 18. The administration of the Securities Act of Montana, Mont. Code Ann. Title 30, Chapter
21 10, Parts 1-3, is under the supervision and control of the Securities Commissioner pursuant to Mont. Code
22 Ann. § 30-10-107.

23 19. The Securities Act of Montana shall be construed to protect investors, persons engaged in
24 securities transactions, and the public interest according to Mont. Code Ann. § 30-10-107.

25 20. The Commissioner and the Department have jurisdiction over this matter pursuant to Mont.

1 Code Ann. § 30-10-107.

2 21. The Department finds Wachovia Securities failed to supervise its employees and engaged
3 in dishonest or unethical practices in the securities business, and that this conduct constitutes grounds to
4 revoke Wachovia Securities' registration under Mont. Code Ann. §§ 30-10-201(13)(k) and 30-10-
5 201(13)(g).

6 22. The Department finds this order and the following relief appropriate, in the public
7 interest, and consistent with the purposes intended by the Securities Act of Montana, Mont. Code Ann.
8 Title 30, Chapter 10, Parts 1-3.

9 **III.**

10 **ORDER**

11 On the basis of the Findings of Fact, Conclusions of Law, and Wachovia's consent to the entry of
12 this Order,

13 **IT IS HEREBY ORDERED:**

14 1. This Order concludes the investigation by the Department and any other action that the
15 Department could commence under applicable Montana law on behalf of Montana as it relates to Wachovia,
16 and its marketing and sale of auction rate securities to investors.

17 2. This Order is entered into solely for the purpose of resolving the referenced multi-state
18 investigation, and is not intended to be used for any other purpose.

19 3. Wachovia will CEASE AND DESIST from violating Mont. Code Ann. §§ 30-10-
20 201(13)(k), and 30-10-201(13)(g), and will comply with the Mont. Code Ann. § 30-10-101, *et seq.*

21 4. Within ten days after the entry of this Order, Wachovia shall pay the sum of One
22 Hundred Forty Eight Thousand Eight Hundred Eleven Dollars and Fifty Four Cents (\$ 148,811.54) to the
23 State of Montana. Payment shall be deposited into the general fund of Montana. Payment shall be made
24 payable to the State of Montana, sent to the State Auditor's Office, Attention: Michael Winsor, 840
25 Helena Avenue, Helena, Montana, 59601.

1 5. In the event another state securities regulator determines not to accept Wachovia's state
2 settlement offer, the total amount of the Montana payment shall not be affected, and shall remain at
3 \$148,811.54.

4 6. Wachovia Securities and Wachovia Capital Markets, respectively, as agents for one or
5 more affiliated companies and not as principal, shall offer to purchase at par ARS that are subject to
6 auctions that are not successful and are not subject to current calls or redemptions ("Eligible ARS") from
7 all investors in the Relevant Class. For purposes of this Order the Relevant Class shall be defined as all
8 investors who purchased ARS from either Wachovia Securities or Wachovia Capital Markets,
9 respectively, on or before February 13, 2008 into accounts maintained at Wachovia Securities or
10 Wachovia Capital Markets, respectively.

11 a. Wachovia Securities and Wachovia Capital Markets, as agents for one or more
12 affiliated companies and not as principal, shall make an offer to buy the Eligible ARS from
13 Individuals Investors, as defined below, who are in the Relevant Class. This buy back shall
14 commence no later than November 10, 2008 and conclude no later than November 28, 2008. For
15 purposes of this Order, Individual Investors shall include natural persons, individual retirement
16 accounts and the following entities or accounts:

17 i. Accounts with the following owners:

- 18 1. non-profit charitable organizations; and
19 2. religious corporations.

20 ii. Accounts with the following owners and with account values or
21 household values up to \$10 million:

- 22 1. trusts;
23 2. corporate trusts;
24 3. corporations;
25 4. employee pension plans/ERISA and Taft Hartley Act plans;

5. educational institutions;
6. incorporated non-profit organizations;
7. limited liability companies;
8. limited partnerships;
9. non-public companies;
10. partnerships;
11. personal holding companies;
12. unincorporated associations; and
13. governmental and quasi-government entities.

b. Wachovia Securities and Wachovia Capital Markets as agent for one or more affiliated companies and not as principal, shall commence a buy back of the Eligible ARS from all other investors in the Relevant Class not otherwise covered by subparagraph a, above, no later than June 10, 2009 and conclude no later than June 30, 2009.

7. No later than November 28, 2008, Wachovia shall pay any investor in the Relevant Class who sold ARS below par between February 13, 2008 and August 15, 2008 and whom Wachovia can reasonably identify, the difference between par and the price at which the investor sold the ARS.

8. Wachovia shall notify all investors in the Relevant Class of the provisions of this Order as provided in paragraphs 9 and 10.

9. As part of Wachovia's general obligation to notify all investors in the Relevant Class pursuant to paragraph 8, above, Wachovia shall mail the Required Notification, defined below, by November 10, 2008, to all investors in the Relevant Class that held ARS positions in a Wachovia account as of August 31, 2008. For purposes of the Order, "Required Notification" shall mean a notice that includes general statements and information specific to each investor, including:

- a. a general notification of all provisions of this Order;
- b. the specific security purchased;

- c. the quantity purchased;
- d. the par value of the holding;
- e. a prominent statement disclosing that at this time the Relevant Class member's ARS holdings may not be liquid and that there is a possibility that this offer may be the only opportunity for the investor to liquidate the ARS holdings; and
- f. a statement that the offer to repurchase the ARS holdings, and other relief specified in the Order, is being made pursuant to a settlement with state securities regulators.

10. By November 10, 2008, Wachovia shall mail the Required Notification to all investors in the Relevant Class that transferred ARS positions to a firm other than Wachovia, prior to the date of this Order, if the initial purchase of the Eligible ARS was on or after January 1, 2003 unless the ARS has been redeemed in full by the issuer.

11. Wachovia shall demonstrate that all investors in the Relevant Class received the Required Notification if Wachovia demonstrates that: 1) Wachovia mailed the Required Notification via First Class mail at the customer's last known address and did not receive a return notice, or 2) Wachovia repurchased ARS from the investor.

12. Wachovia Securities shall establish and maintain a dedicated telephone assistance line, with appropriate staff, to respond to questions from investors concerning the terms of this Order and Wachovia's no net cost loan (nonrecourse, no release) program. Wachovia Securities shall maintain this dedicated telephone assistance line through June 30, 2009.

13. With respect to any claim for consequential damages, to the extent such claims are not resolved informally by Wachovia, Wachovia shall arbitrate the claim of any Relevant Class member who elects to arbitrate, pursuant to the following provisions:

- a. the arbitrations will be conducted by a public arbitrator (as defined by section 12100(u) of the NASD Code of Arbitration Procedures for Customer Disputes, eff. April 16, 2007), under the auspices of FINRA;

1 b. the above-referenced public arbitrator will be available for the exclusive purpose
2 of arbitrating any Relevant Class member's consequential damages claim;

3 c. Wachovia shall pay all applicable forum and filing fees;

4 d. any Relevant Class member who chooses to pursue such a claim shall bear the
5 burden of proving that they suffered consequential damages and that such damages were caused
6 by investors' inability to access funds consisting of investors' ARS purchases through Wachovia;
7 and

8 e. Wachovia shall be able to defend itself against such claims; provided, however,
9 that Wachovia shall not contest liability related to the sale of ARS; and provided further that
10 Wachovia shall not be able to use as part of its defense an investor's decision not to borrow
11 money from Wachovia.

12 14. By November 28, 2008, Wachovia Securities and Wachovia Capital Markets,
13 respectively and separately, shall refund refinancing fees received by it to municipal auction rate issuers
14 that issued such securities in the initial primary market between August 1, 2007 and February 13, 2008,
15 and refinanced those securities through Wachovia after February 13, 2008.

16 15. If Wachovia defaults in any of its obligations set forth in this Order, the Department may
17 vacate this Order, at its sole discretion, upon 10 days notice to Wachovia and without opportunity for
18 administrative hearing or may refer this matter for enforcement as provided in Mont. Code Ann. § 30-10-
19 305.

20 16. This Order is not intended to indicate that Wachovia or any of its affiliates or current or
21 former employees shall be subject to any disqualifications contained in the federal securities law, the rules
22 and regulations thereunder, the rules and regulations of self regulatory organizations or various states'
23 securities laws including any disqualifications from relying upon the registration exemptions or safe
24 harbor provisions. In addition, this Order is not intended to form the basis for any such disqualifications.

25 17. This Order may not be read to indicate that Wachovia or any of its affiliates or current or
26 Consent Agreement and Final Order, Wachovia

1 former employees engaged in fraud or violated any federal or state laws, the rules and regulations
2 thereunder, or the rules and regulations of self regulatory organizations.

3 18. For any person or entity not a party to this Order, this Order does not limit or create any
4 private rights or remedies against Wachovia including, without limitation, the use of any e-mails or other
5 documents of Wachovia or of others for the marketing and sale of auction rate securities to investors, limit or
6 create liability of Wachovia, or limit or create defenses of Wachovia to any claims.

7 19. This Order shall not disqualify Wachovia or any of its affiliates or current or former
8 employees from any business that they otherwise are qualified or licensed to perform under applicable
9 state law and this Order is not intended to form the basis for any disqualification.

10 20. Nothing herein shall preclude the state of Montana, its departments, agencies, boards,
11 commissions, authorities, political subdivisions and corporations, other than this Department and only to the
12 extent set forth in paragraph 1 above, (collectively, "State Entities") and the officers, agents or employees of
13 State Entities from asserting any claims, causes of action, or applications for compensatory, nominal and/or
14 punitive damages, administrative, civil, criminal, or injunctive relief against Wachovia in connection with the
15 marketing and sale of auction rate securities at Wachovia.

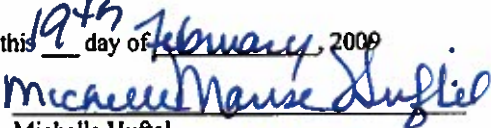
16 21. Wachovia shall pay its own costs and attorneys' fees with respect to this matter.

17 Dated this 19th day of February, 2009.

18 BY ORDER OF MONICA J. LINDEEN
19 State Auditor and Securities Commissioner

20
21 By: 
22 LYNNE EGAN
Deputy Securities Commissioner

23 SUBSCRIBED AND SWORN to before me this 19th day of February, 2009

24 
25 Michelle Huffel
Notary Public for the State of Montana
Residing at Helena, Montana
My commission expires: March 29, 2012.

26 (S E A L)

1
2 **CONSENT TO ENTRY OF ADMINISTRATIVE ORDER BY WACHOVIA**

3 Wachovia hereby acknowledges that it has been served with a copy of this Consent Order, has read
4 the foregoing Order, is aware of its right to a hearing and appeal in this matter, and has waived the same.

5 Wachovia Securities admits the jurisdiction of the Department and Wachovia Capital Markets
6 consents to the jurisdiction of the Department for purposes of this Order. Neither Wachovia Securities nor
7 Wachovia Capital Markets admits or denies the Findings of Fact and Conclusions of Law contained in this
8 Order; and each consents to entry of this Order by the Commissioner as settlement of the issues contained in
9 this Order.

10 Wachovia states that no promise of any kind or nature whatsoever was made to it to induce it to enter
11 into this Order and that it has entered into this Order voluntarily.

12 _____ represents that he/she is _____ of Wachovia
13 Securities, LLC and that, as such, has been authorized by Wachovia Securities, LLC to enter into this Order
14 for and on behalf of Wachovia Securities, LLC.

15 _____ represents that he/she is _____ of Wachovia Capital
16 Markets, LLC and that, as such, has been authorized by Wachovia Capital Markets, LLC to enter into this
17 Order for and on behalf of Wachovia Capital Markets, LLC.

18 Wachovia agrees that it shall not claim, assert, or apply for a tax deduction or tax credit with
19 regard to any state, federal or local tax for any administrative monetary penalty that Wachovia shall pay
20 pursuant to this Order.

21 Dated this ____ day of February, 2009.

22 Wachovia Securities, LLC

23
24 By: 

25 Title: General Counsel

1 SUBSCRIBED AND SWORN to before me this 17 day of February, 2009

2
3 (Signature)

4 (Printed name)

5 Notary Public for the State Missouri

6 Residing at 709 Valley View Dr. Bethel to IL

7 My commission expires: 3/14/2009

8 (S E A L)

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JENNIFER R DUPUY
Notary Public - Notary Seal
State of Missouri, St. Louis City
Commission # 05406973
My Commission Expires Mar 14, 2009

Wachovia Capital Markets, LLC

By: _____

Title: _____

14 SUBSCRIBED AND SWORN TO before me this _____ day of _____, 2009.

16
17 (Signature)

18 (Printed name)

19 Notary Public for the State _____

20 Residing at _____

21 My commission expires: _____

22 (S E A L)

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SUBSCRIBED AND SWORN to before me this ____ day of _____, 2009

(S E A L)

(Signature)

(Printed name)
Notary Public for the State _____
Residing at _____
My commission expires: _____

Wachovia Capital Markets, LLC

By: Barbara Hight

Title: SVP & AGC

SUBSCRIBED AND SWORN TO before me this 18th day of February, 2009.

(S E A L)

Chaniese Stokes Collins
(Signature)
Chaniese Stokes Collins
(Printed name)
Notary Public for the State North Carolina
Residing at Rocklenburg County
My commission expires: June 10, 2011